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IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

DOCKET ENTRIES.

2-12-68—Motion under 28 U.S.C. Section 2255 to vacate and set aside Judgment and Dismiss Indictment, or in the alternative to vacate and set aside judgment and for a new trial filed.

7-22-68—U. S. Attorney files memo brief in opposition to petitioner's motion filed pursuant to Title 28 U.S.C. Section 2255 with certificate of service by mail.

8-1-68—Plaintiff files Memo In Support of Motion under 28 U.S.C. Sec. 2255. Aff. of service attached (card to Jim)

8-9-68—U. S. Atty files reply brief with certificate of servict by mail. (card to Jim).

8-13-68—Order entered: Plaintiff Fred T. Mackey having filed a motion for collateral relief from the judgment of this court in Hammond Criminal No. 3411, pursuant to Title 28 U.S.C. 2255, the court, finding that the motion, records and files of this case conclusively show that the petitioner is entitled to no relief, hereby DENIES said motion for the reasons stated in the memorandum to follows (SE). Beamer;j (copies to counsel).

9-6-68—Memorandum entered denying plaintiffs petition for relief (SE). Beamer;j (copy to Atty. Atty Robert J. Downing and Fred T. Mackey)

9-13-68—Petitioner files notice of appeal.

9-13-68—Clerks certificate of mailing issued and forwarded to counsel.

A True Copy:
Attest: Francis T. Grandys, Clerk

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed February 12, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[1] MOTION UNDER 28 U.S.C. SECTION 2255 TO VACATE AND SET ASIDE JUDGMENT AND DISMISS INDICTMENT, OR, IN THE ALTERNATIVE, TO VACATE AND SET ASIDE JUDGMENT AND FOR A NEW TRIAL.

Plaintiff Fred T. Mackey by his attorneys Robert J. Downing and William M. Ward moves this Court to vacate a sentence heretofore imposed and dismiss the indictments, or, in the alternative, to vacate said sentence and for a new trial, and for reasons therefore states as follows:

1. On January 21, 1964, in a cause then pending before this court entitled *United States* v. *Mackey*, Criminal No. 3411, plaintiff Mackey was found guilty by a jury on an indictment of five counts charging violation of 26 U.S.C. 7201, Internal Revenue Code, for the years 1956 through 1960.

2. On March 24, 1964, this Court entered judgment and plaintiff was sentenced to five years imprisonment on each count to run concurrently, and was fined $10,000 on each count. This judgment and sentence was affirmed by the Court of Appeals for the Seventh Circuit and a Petition to the Supreme Court for a Writ of Certiorari

therefore was denied. Plaintiff Mackey is presently [2] and since December, 1965 has been serving this sentence.

3. On January 29, 1968, the Supreme Court of the United States in *Marchetti* v. *U. S.* and *Grosso* v. *U. S.*, 36 L.W. 4143 and 4150 held:

A) That the interrelated statutory system for taxing wagers (26 U.S.C., Sect. 4401 et. seq.) violated a taxpayer's privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution; and,

B) That Internal Revenue Service Forms 730 required to be filed monthly by a taxpayer with the payment of the excise tax on wagering violated the taxpayer's privilege against self-incrimination.

4. That during Mackey's trial in the Court in *U. S.* v. *Mackey,* Crim. No. 3411, the Government, over Mackey's objection, offered as Government exhibits 30 thru 89 inclusive, sixty (60) monthly Form 730 wagering excise tax returns previously filed by Mackey with the Internal Revenue Service pursuant to the statutory scheme condemned in *Marchetti* and *Grosso*; that this Court at the time said Form 730's were offered by the Government characterized said exhibits as "somewhat inflammatory" but thereafter admitted said returns into evidence upon the Government's assertion that these returns were necessary evidence to provide evidentiary and factual support to another Government exhibit (Exhibit 765, a net worth summary), (*U. S.* v. *Mackey,* Crim. No. 3411, Tr. 2475-2479, 4621-4634 (copies of which are attached); see also 5519, 5524-5528; and pp. 22-23 Tr. of March 24, 1964 hearing on defendant's motion to reconsider).

[3] 5. That in its final argument to the jury, the Government then contended that the aforesaid Forms 730 showed a likely source of Petitioner's income from gambling, a necessary element of the case to be proved by the Government in a net worth type case (Tr. 5669-5670, copies of which are attached); and that on appeal in the Court of Appeals for the 7th Circuit, the Government contended and argued that the admission of these wagering tax returns "constituted a part of the Government's case on the important issue of a likely source of unreported taxable income" (Government's Brief, p. 43, *U. S.* v. *Mackey,* No. 14584 in the Court of Appeals for the 7th Circuit).

6. That the incriminating admissions of gambling activities, and the other incriminating information relative thereto as contained in the said Form 730's were coerced from plaintiff Mackey pursuant to and under pain of punishment as prescribed in the aforesaid statutory system for taxing wages in violation of Mackey's privilege against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States. As such, said Form 730's were:

A. Constitutionally inadmissible in evidence against Mackey at his trial; and

B. As admitted, the inflammatory and prejudicial Form 730's adversely influenced the very reliability and integrity of the fact finding process at his trial so as to prevent Mackey from having a fair trial.

7. That the privilege against self-incrimination extends not only to answers that would in themselves support a conviction [4] of the crime charged, but likewise embraces those answers or statements which could be

used as investigatory leads, or which would furnish a link in the chain of evidence needed to convict. That the incriminating statements and admissions concerning wagering and gambling contained in said Form 730's in violation of movant's privilege against self-incrimination provided a) investigatory leads to the Government which lead to the indictment of Mackey and the evidence introduced by the Government at his trial which was the fruit of said investigatory leads, and b) a link in the chain of evidence which by the Government's own admissions was needed to convict Mackey.

8. That the coercion from Mackey of the aforesaid incriminatory Forms 730 and their admission against him at his trial was a denial of his constitutional privilege against self-incrimination and his right to a fair trial.

9. That Fred T. Mackey's liberty has been restrained since December, 1965 as a result of a trial in which the use of the inflammatory and unconstitutionally obtained Form 730's were admitted as an integral part of the Government's proof of "likely source" as required in net-worth type cases.

Wherefore, movant prays as follows:

1. That this Court cause notice of the filing of this cause to be served upon the United States Attorney for the Northern District of Indiana, and grant a prompt hearing thereon pursuant to 28 U.S.C. Sect. 2255;

[5] 2. That this Court vacate and set aside its judgment of conviction and sentence heretofore entered on March 24, 1964, in the cause entitled *United States* v. *Mackey,* Criminal No. 3411, and order the plaintiff dis-

charged from the custody of the Attorney General and the indictments in said cause dismissed; or, in the alternative, order plaintiff discharged from the custody of the Attorney General and order a new trial in said cause.

3. That this Court take whatever other and further action the Court deems just and equitable in the premises.

Respectfully submitted,

Fred T. Mackey, Plaintiff
By /s/ Robert J. Downing
/s/ William M. Ward

TRANSCRIPT OF PROCEEDINGS IN THE CRIMINAL TRIAL IN THE UNITED STATES DISTIRCT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

[Appendix Volume III, pp. 1364-1373]

* * * * *

[4621] Mr. Downing: Before any testimony is elicited with respect to Government Exhibit 765, I want to strenuously object as to the admissibility of any testimony of this type for the following reasons:

The only purpose for making any reference to the 730 forms is for the purposes of inflammatory prejudice, bias, and to completely muddy up the waters here insofar as the questions involved in the indictment in this case.

The testimony in this record to date clearly indicates that Schedule C on the [4622] various returns were prepared, but they pertain to policy, as distinguished from insurance policy—and I am not sure you distinguish it in any respect—but for the purpose of the record, there has been testimony, and the testimony was by Frank Smith, in substance, that the figure on Line 1 of Schedule C pertains to this item and was arrived at by him, this is his computation, by taking, as he called it, the ins, from which he deducted the outs, and then he made the return.

He also listed on the return the excise tax, and he stated that the excise tax was ten per cent of the gross amount, or the amount of the ins as listed on the books which he had. Therefore, unless there is some question with respect to the accuracy of the excise tax payment —and we are not on trial for that, that it was or was not properly paid, it is a separate offense—we cannot

be charged in this indictment for the amount of excise tax paid. That is a separate matter.

[4623] Therefore, I say there is absolutely no reason why this type of exhibit, or any testimony relative to that should be permitted. It is like the ringing bell that you cannot unring once you get it started—once you would get it in, it would be in.

We have been proceeding along in this case for four weeks on nothing but insurance, except for the isolated testimony of Mr. Smith, and now, they cap it off with a projection here that we are not on trial for.

The Court: I understand that.

Mr. Downing: The point is the testimony he seeks to offer is already in evidence, without the necessity of what is Form 730; this only magnifies something—

[4624] The Court: The point is, that the evidence shown by this exhibit is already in evidence?

Mr. Downing: Yes, your Honor, it can be computed by taking the amount of the net—

The Court: Well, you are talking about the form of the evidence. Sure you can compute lots of things, but I am not going to control the method by which the Government puts in evidence, if they have competent evidence.

Mr. McNelis: May I show your Honor the Schedule of the 1956 return, which is in evidence (indicating). That line calls for total receipts, Line 1, and I ask your Honor to compare the figures the total receipts, and the total receipts is the same as gross receipts in any parlance, your Honor.

Mr. Downing: Now, there is absolutely no testimony, except what Mr. Smith has testified to, that is in the record, and [4625] Mr. Smith testified as to what he did.

Mr. McNelis: Let us not forget what Laura McComb testified in connection with this.

Mr. Downing: She did not prepare the income tax returns that we are on trial for.

The Court: What do you propose to do with this, Mr. McNelis?

Mr. McNelis: Show the combination, your Honor, between what is in the record—

The Court: Well, I think this can only be done after the returns are in evidence. Isn't that right?

Mr. McNelis: Yes, your Honor, and at this minute, I intended to offer the wagering tax returns in evidence. They are not in. The only ones offered were 50 to 89, I believe when Miss Laura McComb was testifying, and your Honor reserved ruling—well, the returns from 30 to 58 were not offered yet. I intended to do it at this particular minute, I was going to offer those returns, your Honor.

Mr. Downing: If your Honor please, [4626] these characterizations are merely their own characterizations.

The Court: What does the total receipts mean on this exhibit, Schedule C?

Mr. Downing: Oh, your Honor, I agree that total receipts could mean what you are asking, but the point is that insofar as the practice of this, the practice which was followed—I recall very clearly the testimony wherein Mr. Smith was asked, "How did you prepare this", and he testified as to how he prepared it. Now this exhibit here (indicating) over here, not the return that you have, your Honor, but this Exhibit 765 is based upon these 730 Forms.

The Court: Yes.

[4627] Mr. Downing: As I say, your Honor, without the necessity of putting in the 730, this is the same type of computation.

The Court: I rejected the 730 originally on the grounds that Schedule C on the return showed the information contained in the 730, if that is the gambling tax return. Then I thought it was cumulative, and I thought somewhat inflammatory.

Mr. McNelis: I would ask Mr. Downing, your Honor, to work with those returns as long as he desires, and if he can show me where these amounts of money are, I should be delighted to find out where they are.

Mr. Downing: If I may, and let me have the return, and let me explain my position.

I am looking at what is identified as the exhibit, and let's be specific—

Mr. McNelis: That is the year 1956?

Mr. Downing: Yes. For the year 1956 on Schedule C, he shows excise tax of $14,226.86, and Mr. McNelis asked Mr. Smith [4628] how he arrived at that figure. He said ten per cent of the gross. Therefore, having to accept Mr. Smith's testimony, $142,268.60 represents the gross receipts as set forth in the ins section, the total set forth in the first line of Schedule C, the $35,640.00.

I submit to your Honor that insofar as the figures are concerned, it is obvious that the difference represents what Mr. Smith has characterized as outs.

Mr. McNelis: In following it through, your Honor, we will see on the return at least some deductions. There is no question that some of them are on the return, and what are these so-called outs reflected on the return?

The Court: Well, I am going to let the returns in. I don't know whether or not I will let this in, but I will let the 730, or whatever the number is, I will let that in. I think they are competent evidence, and in view of the statements that all of the information that is [4629] contained thereon is not shown on Schedule C of the an-

nual returns, I am going to let them in. I do not think the Government is required to ask the jury or anyone else to make a computation from Schedule C, if that is the only evidence available.

Mr. Downing: The only purpose, your Honor, and my objection goes, of course, to the 730 forms as well as the document here—I object for the reasons I have just stated. The only purpose for offering the wagering stamp or the 730 forms is strictly from the standpoint of trying to get something in that they have otherwise not been able to do.

The Court: There is no question but that it is income, Mr. McNelis?

Mr. McNelis: Are you asking me? I don't know.

The Court: No, I meant Mr. Downing.

Mr. Downing: I don't know whether it is or is not. To the extent, if this money was paid out, there is no tax.

[4630] The Court: Well, it is income, no matter how you arrive at it.

Mr. Downing: It does not shed any light.

[4631] The Court: Well, proceed. I think there is no objection before me.

You are going to offer objections to any reference—

Mr. Downing: I wanted the record to be clear before there was any testimony, that any testimony pertaining to Exhibit 765, I would object to any testimony for the reasons set forth, as well as the fact that this is based on Government Exhibits 30 to 89, that are not in evidence at this time.

Mr. McNelis: I am going to offer them now.

Mr. Downing: Let the record show that my objections to Government Exhibits 30 to 89 are for the reasons I stated, without having to come up here to state them again.

The Court: Very well.

Mr. Downing: I further want the record to show with respect to Government Exhibits 30 to 50, those are the ones where the record does not show who prepared [4632] them.

The Court: They are signed by the defendant.

Mr. Downing: There is no testimony in, your Honor, with respect to those returns.

Mr. McNelis: I do have them here and if Mr. Downing wants them identified, I have the District representative here who will testify they were located in the office of the District Director, and received in the normal course of business by the District Director's office.

The Court: Very well.

Mr. McNelis: I have Mr. Hopkins out here, if that is part of your objection.

Mr. Downing: I would be glad to stipulate that Mr. Hopkins would so testify, but it still does not tie it to the defendant, and I object.

The Court: Well, if you will stipulate he would so testify.

[4634] Mr. McNelis: May it please the Court:

At this time, your Honor, the Government offers in evidence Government's Exhibits 30 through 51, your Honor; and reoffers Government's Exhibits 52, through and including 89.

Mr. Downing: Objection, for the reasons just stated.

The Court: Very well. The objection is overruled. The exhibits are admitted.

Mr. McNelis: May the record show, your Honor, I am presenting to the witness, Mr. Harrington, Government's Exhibits 30 through and including Government's Exhibit 89?

Mr. McNelis: And I am also presenting to the witness, your Honor, Government's Exhibits in evidence No. 9, individual income tax return of Fred Mackey—Fred and Ella Mackey for the calendar year 1956; Government's Exhibit 10, individual income tax return of Fred and Ella Mackey for the year 1957; Government's Exhibit 11, return of the same two individuals for the year 1958; Government's Exhibit 12, the same individuals for the year 1959; and Government's Exhibit 13, individual income tax return of Fred and Ella Mackey for the year 1960.

By Mr. McNelis:

Q. Mr. Harrington, do you have before you Government's Exhibit for identification 765?

A. Yes, I do.

Q. Was that Government's Exhibit for identification 765, Mr. Harrington, made at my request?

A. Yes, it was.

Q. And from where did you get the information, Mr. Harrington, that is reflected on Government's Exhibit 765?

A. The information was taken from Form 730's filed for the years 1956 through 1960.

Q. They are, Mr. Harrington, Government's Exhibits 30 through and including 89?

A. That's right.

Q. And what other facts?

A. The income tax returns for 1956 through 1960. [4636] Q. And did you use the entire income tax returns, Mr. Harrington, for the years 1956 through 1960, or portions thereof?

A. Just a portion.

Q. And what portion did you use, Mr. Harrington?

A. A Schedule C.

Q. Was a Schedule C in each and every instance a part of the return for the particular year involved?

A. Yes, it was.

Mr. McNelis: Your Honor, at this time the Government will offer in evidence Government's Exhibit 765.

Mr. Downing: The same objection, your Honor.

The Court: I think without further explanation I will sustain the objection. I don't think—while he has testified as to what it is, he has testified as to how he made it, but unless it is self-explanatory—and I don't have a copy of it—

Mr. McNelis: I am sorry, your Honor. I thought you had one.

[4637] The Court: The objection is overruled. It may be admitted.

By Mr. McNelis: You have it before you, Mr. Harrington.

The Witness: Yes.

By Mr. McNelis:

Q. Mr. Harrington, in connection with Government's Exhibit 765, for the year 1956 you have a figure of $142,668.25. Is that correct?

A. Yes, sir.

Q. From where did you get that figure, Mr. Harrington?

[4638] A. This is a yearly total of the Form 730's, taking the gross amount of wagers as reported on those forms.

Q. And the next figure in the column 1956 that you have is $19,662.93?

A. This is a total—

Q. Where did you get that figure, Mr. Harrington?

A. This is a total of the expenses listed on Schedule C of that—for this operation.

Q. Could you refer to the Government's Schedule C you are referring to, Mr. Harrington?

A. Schedule C on—Exhibit 9 (indicating).

Q. And the third figure in the column 1956, Mr. Harrington; from where did you get that figure?

A. That is the difference between the income, or the gross amount of the wagers reported for the year 1956 and the expenses claimed on Schedule C.

Q. What is the difference, Mr. Harrington?

A. $123,005.32.

Q. And the next figure under 1956, Mr. Harrington, is what?

A. It is the net profit shown on Schedule C of Exhibit 9.

Q. And what is that net profit, Mr. Harrington?

A. 15,977.31.

Q. And the next figure, Mr. Harrington, for 1956 [4639] is what?

A. Is $107,027.61.

Q. And from where did you get that figure, Mr. Harrington?

A. That is the difference between the 123,000 and the 15,000 reported as profit on Schedule C on Exhibit 9.

Q. And, Mr. Harrington, for the Government's Exhibit 765 for the years, 1957, 1958, 1959 and '60 you have prepared the same type of information in columnar form, did you not?

A. That is right?

Q. And the information there was obtained from the sources you related with respect to the year 1956?

A. That is right.

Q. Except that for '57 you used the '57 return; for '58 you used the '58 return; for '59 the '59 return, and for '60 the '60 return?

A. True.

Mr. Downing: If your Honor please, we would like to reserve cross examination and do it all at one time. I understand he is to be recalled?

• • • • •

[Appendix Volume IV, p. 1875]

[5589] Mrs. Fannye Benford would suggest to you, ladies and gentlemen, Mr. Fred Mackey never went near those three safes. Mrs. Fannye Benford would have you believe, ladies and gentlemen, that Mr. Fred Mackey never had $50,000.00. The very testimony "He don't have that kind of money. He didn't have that kind of money."

May I suggest, ladies and gentlemen, in your examination of the evidence in this case and particularly the documentary evidence, that you take a look at Government's Exhibits 51 through 89, and may I suggest in connection with that, to expedite your examination, Government's Exhibit 765, another one of Mr. Harrington's now famous charts. His Honor will instruct you on what use these may be to you. They are not evidence. They are merely to aid you and assist you so you do not have to get your papers and pencils out and do your computations. But, look at Government's Exhibit 765, and you determine on the basis of varied documents prepared at the direction of the defendant by Miss Laura McComb from books and records and information given her [5590] by the defendant, whether Mr. Fred Mackey ever had $50,000.00.

• • • • •

[Appendix Volume IV, pp. 1920-1921]

[5669] phoney mortgage, not one cent of money passed for that mortgage.

You may recall that I asked Mrs. Benford about that same mortgage, and she did not know anything about it. Yet, when she was shown the document, her signature, her very own signature which she admitted was on that document.

Again, with respect to cash on hand, current taxable income. Where did the money come from? I don't know. I can hazard a guess, and to the extent that this might be speculation, it is speculation.

I talked about Government Exhibit 765 this morning, Mr. Downing talked about it this afternoon, and I am now talking about it again. What is Government Exhibit 765?

It is no more or no less than totaling figures from Government Exhibits 30 through 89, the so-called 730 returns, the so-called wager tax returns, the so-called, as Mr. Downing refers to them, policy returns—policy, to be sharply distinguished from the policy written by Gibraltar Insurance Company, or Gibraltar Mutual Life Insurance Company.

Those returns, if you recall the [5670] testimony of Miss Laura McComb, were prepared by her, at least from 1958 on, and they were prepared by her from information given to her by none other than this defendant, Fred Mackey. There is where the information came from.

Oh, it is true, that Mr. Smith talked about the "ins", and the "outs", but who was the only person that really knows whether all of the "ins" are in, and who is the only person who really knows whether all of the "outs", were really paid out? Not Frank Smith, not Laura Mc-

Comb, not Mr. Kallimani, not Mr. Harrington, not Mr. Blackwell. There sits the only man who knows whether those forms were correct. Nobody in the Government knows that.

Mr. Downing wants a likely source for the increases in net worth. I respectfully suggest that Government Exhibit 765 is a most likely source.

Mr. Downing wants a likely source. I respectfully suggest another likely source. We did hear in this case an awful lot about stocks, rents, dividends. Who got dividends on all of the stock? Mrs. Fannye Benford, after she realized what was going on, would have to be shown the documents before

* * * * *

[Appendix Volume I, pp. 224-231]

Mr. Downing: My objection was as to Exhibits 1 through 8.

The Court: Exhibits 1 through 8 are admitted.

[250] Mr. Downing: If your Honor please, with respect to Government's Exhibits 9 through 13, I have no objection as to the authenticity or in general as to their materiality or relevancy.

There are statements which are included on the returns which raise a question of interpretation, if you will—for instance, on Government's Exhibit—that is for the year 1960, that is No. 13 (submitting exhibit to the Court). Schedule C, there is a reference to the word "policy" (indicating).

The Court: A reference to what?

Mr. Downing: The word "policy", p-o-l-i-c-y (indicating).

There are certainly many connotations that can be applied to that word, standing alone: The question of wheth-

er or not it is a matter of violation of a state statute, which [251] we are not on trial for; the question of whether or not this has any other meaning—at the moment I am not sure.

It is up to the Government, of course, to establish its case.

Now, in that connection there are other returns that have different statements—unfortunately, the pattern of consistency here was not always the same.

[252] For the year 1959 (submitting exhibit), the same schedule, that is, Exhibit No. 12, the same schedule has written after the typed word "policy," the word "wheel" (indicating).

Now, the defendant objects, because we have no knowledge as to how and when that was written into that return. It is inconsistent with not only the 1960 return, but it is also inconsistent with another portion of this return, —excuse me, please—do you have the part that you have deleted from '59 that shows the self-employment tax, Charley?

Mr. McNelis: (Presenting exhibit.) Not on this one, no; we have just the return as filed.

Mr. Downing: No, no; the part that was taken off at this perforation (indicating)?

What I am getting at is, if I recall, this is the one that shows "policy", just "policy" in another portion of this return.

Mr. McNelis: You have them there, the originals.

Mr. Downing: Yes, but the perforation has been taken off (indicating).

Mr. McNelis: What is your objection?

Mr. Downing: What I am trying to point out is that on the bottom of the self-employment tax form here [253] the words typed in here, "policy" (indicating).

Mr. McNelis: You said the words were typed in, "policy"?

Mr. Downing: It was typed in, "policy."

Mr. McNelis: May I ask the source of your information?

Mr. Downing: From the copy that was returned by the taxpayer. Now, that is the same as the way it is on here (indicating).

The Court: That was under the Social Security form?

Mr. Downing: Yes, the self-employment.

The Court: Can you account for the fact that "wheel" is written in?

Mr. McNelis: Your Honor, the next witness will be the individual who prepared these returns.

The Court: All right. We will reserve ruling on this until such time as you have him on the stand.

Let's see, that was Exhibit No. —

Mr. Downing: That was Exhibit 12.

The Court: All right.

Mr. Downing: Now, this one here definitely was typed in (submitting exhibit).

Mr. McNelis: May I ask what the exhibit number [254] is?

Mr. Downing: That is Exhibit No. 11.

That one raises this question about the gambling, the violation of any Indiana gambling law.

The Court: Well, what is the point about the Indiana Gambling law?

Mr. Downing: My point is that the question of any policy operation having to do with or indicating a violation of any Indiana gambling law is going to be prejudicial to this defendant.

The Court: It is his return.

Mr. Downing: That may be. I agree with you. But, nevertheless, insofar as the return is concerned, that portion of it can be blacked out so that the source of the net income is "other income." Otherwise, we are going to be trying this case on a question of violation of a State law, rather than—

The Court: No, we are not going to try it on that basis, I assure you. If it gets into the case, the jury will be adequately instructed on that.

Mr. Downing: Well, that is the basis of the objection to the '57 return; it shows "policy operator."

And in the '56 return, it also uses the characterization, "policy operator."

[255] The Court: Yes.

Mr. Downing: Now, that is the basis of our objections to Exhibits 9 through 13, and the one with respect to Exhibit 12 has to do with the question concerning the writing in of the word "wheel."

The Court: I will reserve ruling on Exhibits 9 through 13 until we hear the testimony.

[258] Mr. McNelis:

(Government submitted Exhibits Nos. 14, 15, 16 and 17 into evidence. Corporate Income Tax Returns, M. W. & E. Investment Company for fiscal years 1958, 1959, 1960, 1961.)

[259] Mr. Downing: Your Honor, with respect to Exhibits 14 through 17, the returns purport to be the returns of M. W. E. & S. Investment Company, Inc. for the years to which Mr. McNelis has referred.

The Indictment does not charge any alleged invasion or evasion of tax returns by Mr. Mackey on behalf of this company.

The Court: I will reserve ruling until the matter is connected up.

Mr. McNelis: May we approach the bench, your Honor?

The Court: Yes.

[260] The Court: He has brought up the question that this company is not charged.

Mr. Downing: That corporation.

Mr. McNelis: That is correct, your Honor.

The Court: Well, I think I could rule either way on them. I could let them go in subject to a motion to strike if not connected up, but I prefer the other method because that would require more bookkeeping. I will reserve the ruling until there is some connection shown.

The Court: I will reserve ruling on the motion to introduce Exhibits 14, 15, 16, and 17.

[261-262] Mr. McNelis:

(Whereupon Government submitted exhibits Nos. 18 through 23, U. S. Life Insurance Company Income Tax Returns, Gibraltar Industrial Life Insurance Company for calendar years 1954 through 1959.)

Mr. Downing: The defendant makes the same objection.

[263] The Court: All right, we will reserve the rulings.

Mr. McNelis: Thank you, your Honor.

Shall I proceed, your Honor?

The Court: You may proceed.

Mr. McNelis:

(Whereupon Government offered exhibits 24 through 29, U. S. Life Insurance Income Tax Returns, Gibraltar Mutual Life Insurance Company for years 1955 through 1960.)

[264] Mr. Downing: The same motion, your Honor.

The Court: All right. The same rulings. The rulings will be reserved.

Mr. Downing: The group of exhibits commencing with Exhibit No. 30 through 95—I suppose these are the series that you are now going to offer?

Mr. McNelis: That is correct.

Mr. Downing: Has to do with the tax on wagering, as well as the 11-C?

Mr. McNelis: That is correct.

Mr. Downing: Has to do with the forms pertaining to the tax on wagering, as well as application for the wagering stamps.

They involve the—I note that No. 95 has to do for the year 1961, which is another objection. That, I believe, is generally separate from the one that I am going to make.

The Court: All right. Is that offered?

[265] Mr. McNelis: This was offered, your Honor, for the purpose of showing the earned income of the debtor for the calendar year 1960, and more particularly December, 1960.

The Court: This was his return?

Mr. McNelis: This was his return, your Honor, which had been filed in January, '61, with respect to the business of December, 1960.

Mr. Downing: Is 95 in this group? I don't believe we have that in front of us. That is the 11-C form, isn't it?

Mr. McNelis: 11-C? I will get it.

These should go up to Exhibit 92, I believe, or about 92.

Mr. Downing: No, they go to 89.

The Court: 89, I think is the last one of these.

Mr. McNelis: (Indicating) There are your monthly statements.

Here (indicating) are the applications for the stamp, which are a yearly return, as distinguished from the other, which is a monthly return.

Mr. Downing: Is this the one I am looking at?

The Court: 95 is July 1, 1960, tax return and application for registry. It covers a period—I don't [266] know. I don't see where there is any tax information on 95.

Mr. Downing: I don't, either.

Mr. McNelis: There is no tax information on 95, your Honor.

The significance of this particular return is that we will, of course, have problems of sources of income.

The Court: Yes?

Mr. McNelis: Or the occupation and businesses of the defendant. This is material and relevant with respect to one of his activities, which was income-producing.

The Court: This is July 30, 1960, to June 1, 1961?

Mr. McNelis: It is his application.

Mr. Downing: Well, I see that date of June 2nd, 1960, down here. It ends at June 2, 1960.

The Court: Yes.

Mr. Downing: As to that first part of it, I will withdraw that part of it.

The Court: All right.

Mr. McNelis: This is an income producing activity of the defendant.

[267] The Court: Yes, I understand.

Mr. Downing: The other, which is the major portion of the objection, is that we are not on trial for any evasion or for any failure to file or attempt to evade or defeat any taxes on Forms 740 or 730. We are not on trial for any fraudulent attempt or failure to file Form 11-C, or any false statement, either in Form 730 or 11-C.

The only purpose—the only purpose of putting these in is to muddy the waters here from the standpoint of—

The Court: Is all the evidence on these exhibits covered in Schedule C?

Mr. Downing: That's right.

The Court: Is Schedule C, filed by the defendant?

Mr. McNelis: Your Honor, that is a nice question. My answer right now would be no.

Mr. Downing: Well, we disagree with that. We say that the information is there.

The Court: Well, if you are contending that all of the Government—I mean all of the revenue derived as shown by these forms was not covered by Schedule C on the annual returns, then I think these are admissible. [268] However, if—

Mr. McNelis: I have one other contention, your Honor.

The Court: All right.

Mr. McNelis: Who prepared them? Where did the information come from? Were those made available to the individual preparing the returns?

Mr. Downing: We are not on trial for that.

The Court: I am inclined to agree with the defendant on that.

If they show nothing different than these schedules to the annual forms, then I don't think they are admissible; because the only purpose then, I think, would be to muddy up the waters, I think is the term you used.

Mr. Downing: That is right, your Honor.

The Court: If they show—if it can be shown that there is different tax information on these than is reported on Schedule C of the annual return, then I think they are admissible.

Mr. Downing: I think he should first show—

The Court: But until such time as we have such a showing here, I will reserve the ruling.

Mr. McNelis: Fine, your Honor. Very well.

Mr. Downing: And there will be no statement before the jury about these?

[269] The Court: No. You may go ahead and offer them, just simply—

Mr. Downing: Wait just a minute. Wait just a minute.

The Court: Well, no. He can simply offer them without showing or stating what they are, just as Exhibits 30 through 95.

Mr. Downing: This is a return of the tax on wagering, is all it is, and that is one of the vices permitted by the ruling.

Mr. McNelis: Your Honor, I am willing to forego mentioning about this at this time. The lunch hour will give me time to find out what I need to know.

The Court: All right. Very well.

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed August 13, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[38] ORDER

Plaintiff Fred T. Mackey having filed a motion for collateral relief from the judgment of this Court in Hammond Criminal No. 3411 pursuant to Title 28 U.S.C. §2255, the Court, finding that the motion, records, and files of this case conclusively show that the petitioner is entitled to no relief, hereby DENIES said motion for the reasons stated in the memorandum to follow.

/s/ George N. Beamer
U. S. District Judge

Enter: August 13, 1968

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed September 6, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[39] MEMORANDUM

Plaintiff was indicted in March, 1963, for "willfully and knowingly attempt(ing) to evade and defeat a large part of the income tax due and owing by him and his wife for the calendar year(s) of 1956 (through) 1960 by willfully preparing and causing to be prepared * * * false and fraudulent income tax return(s) * * * in violation of section 7201 Internal Revenue Code; 26 U.S.C. Section 7201." He was found guilty by a jury and the conviction affirmed on appeal. *United States* v. *Mackey*, 345 F. 2d 499 (7th Cir. 1965), *cert. den.*, 382 U.S. 824, 15 L. ed. 2d 69 (1965). The Government presented its case on the net worth method—it attempted to show that the petitioner's net worth increased during the subject period in an amount unaccounted for by his reported income and non-taxable sources. A crucial step in prosecuting a case under this method is the establishment of a probable source of the unreported income, in this case "policy" or gambling. One type of proof offered to establish this probable source of unreported income were Government Exhibits 30 through 89, which were monthly gambling excise tax returns, Form 730, required to be filed by one who is subject to the excise tax on wagering.

(Title 26 U.S.C. §4401, Treas. Reg. §44.4011(a)-1(a)). These returns were objected to at the trial on the [40] grounds that they were inflammatory, prejudicial, and irrelevant, but not on the ground that their admission violated the plaintiff's right against self-incrimination. Although the Appellate opinion did not expressly consider these items, it is obvious that they are referred to in the paragraph at 345 F. 2d 499, 507 (7th Cir. 1965) which stated:

> Defendant raises various other issues, inter alia; whether the trial judge properly admitted certain evidence; . . . We have carefully considered these and all other issues raised by defendant and find no prejudicial error.

This constitutes a final ruling on those objections raised at trial and on appeal, and they are not considered here. The plaintiff however, raises a new and serious question with respect to these items: whether their admission violated his privilege against compulsory self-incrimination as guaranteed by the Fifth Amendment to the Constitution.

These returns were filed as a part of a comprehensive system for the taxation of wagering. Title 26 U.S.C. §4401 imposes an excise tax on wagers equal to ten per cent of the amount thereof. Title 26 U.S.C. §4403 provides that every person liable for the tax, meaning those engaged in the business of accepting wagers, shall keep a daily record showing the gross amount of wages. To collect these taxes, Treas. Reg. §44.6011(a)-1(a) requires the taxpayer to submit a Form 730 each month showing the wagers collected, etc. Although not required by the statute, the Internal Revenue Service will not accept the tax without the form. (See *United States* v. *Grosso*,

19 L. ed. 2d 906, 910-11 (1968)). Also part of this same system is the occupational tax on engaging in the business of accepting wagers. Title 26 U.S.C. §§4411-4414.

The effect of these statutes has been severely limited [41] by the decisions of the Supreme Court in *Grosso* v. *United States,* 19 L. ed. 2d 906 (1968); and *Marchetti* v. *United States,* 19 L. ed. 2d 889 (1968). In *Marchetti* the Court held that a plea of compulsory self-incrimination was a bar to prosecution for failure to comply with the wagering occupation tax, and *Grosso* held the same with respect to the wagering excise tax. *Grosso* also held that defendant's failure in that case to raise the Fifth Amendment question, with respect to a charge of failing to pay the occupation tax, did not waive his right against self-incrimination to that Court. There are three salient features of the opinions of importance in this case. A careful examination of the cases shows that the Court based its decisions on the widespread and almost total criminal prohibition against gambling of the type taxed. It found that a defendant subject to the tax was operating in the shadow of criminal penalties imposed by both State and Federal governments. This, coupled with the fact that Congress had provided for disclosure of all information garnered in connection with the occupation tax, and that the Internal Revenue Service revealed excise tax information to law enforcement officers as a matter of policy, led the Court to find that this scheme seriously abridged the gamblers' right against self-incrimination. The Court held, in both cases, that a plea of self-incrimination would be a bar to prosecution. A defendant in a *criminal* prosecution for failure to pay the tax or abide by the ancillary requirements could not be convicted if he stated that to have abided by the requirements would have incriminated him.

Second, the Court did not strike down either tax. In *Marchetti,* it said, at 19 L. ed. 2d 889, 905:

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; [42] we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

Third, while the Court did not expressly deal with the admissibility of forms and returns filed in compliance with these acts either before or after its decisions, it did, over the vigorous objection of the Chief Justice, refuse to adopt a rule which would prohibit disclosure of information obtained under the acts rather than prohibit punishment for their violation. The Government had suggested prohibiting disclosure in an effort to save the criminal penalties associated with the tax and the Government's ability to collect the tax itself. The Court found that the Congressional purpose in requiring disclosure was so strong that it should not adopt the tendered alternative. In addition, this Court will have to consider the retroactive effect of the principles (although not the rule) adopted, and the possibility that the plaintiff here may have, at some point, waived any privilege with respect to these documents.

The first point is immediately in dispute. Mackey was not charged with violating gambling laws. He was charged with income tax evasion. The fact that the Exhibits in question showed that he was guilty of other criminal activity, not directly relevant to this trial, has already been considered by this court and the Court of Appeals, and will not be reconsidered. That there is no privilege against incriminating oneself by filing income tax re-

turns and keeping required records is too well established to require discussion. That was all these returns were used for in this case. They pointed to a possible source—whether legal or illegal is irrelevant—of income. They showed that the defendant Mackey could have earned [43] more than he reported. It is certain that the Supreme Court would not have jeopardized the gambling tax scheme on the ground that required returns would have incriminated someone of having income or a source of income not reported on his income tax returns. Any possible compulsory self-incrimination involved in filing these returns was simply not relevant to the case at bar. Defendant was not charged with, and was not convicted of, violation of the gambling laws.

Secondly, it is spurious to argue that the information gathered and introduced into evidence was a product of unconstitutional statutes. As stated earlier, the Court did not find these statutes to be unconstitutional. Instead, it held that it was unconstitutional to punish someone for failing to supply the information required by the statutes and attendant regulations. Exhibits 30 through 89 were, therefore, not the fruits of an unconstitutional scheme.

Thirdly, the Court itself refused to find that these returns, once filed, should be made confidential. Of course, in the future a person will not be able to claim that he was compelled to give evidence against himself after he files a return. He could have refused to file a return and the *Marchetti* and *Grosso* decisions would protect him from punishment. The issue here is whether a defendant who filed returns prior to the decisions may claim that he was compelled to do so in violation of his constitutional rights.

There are two basic reasons for the prohibition against self-incrimination and the use of coerced confessions—their unreliability and the sanctity of the individual. They are unreliable because a person under severe physical and/or mental [44] pressures may confess to a crime he did not commit solely to escape the torment imposed by his interrogators. This was the primary policy behind the rule which excluded only coerced confessions while admitting those which were voluntary, even if made without knowledge of one's rights. That rule, of course, has now been supplanted by one which looks not merely to the voluntariness of the confession, but also to the intelligent waiver of the right against self-incrimination. *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. ed. 2d 694 (1966); *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. ed. 977 (1964). This newer approach looks not only to the trustworthiness of the confession, but also to the rights of the accused and the sanctity of the judicial process. It is based on the belief that the right against self-incrimination is not a mere rule of evidence, but a fundamental liberty afforded to the guilty and innocent alike. These dual considerations are important in determining the effect to be given decisions and rules in this area of the law. (See *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. ed. 2d 882 (1966)).

In relation to the gambling excise tax returns, there is little danger of their unreliability other than their possible understatement of liability. No one would file a wagering tax return unless he was engaged in wagering because he would incur a tax liability; his activities would become subject to close scrutiny; and he might be prosecuted for a crime which he did not commit. On the other hand, if he is not engaged in wagering, there

is no reason for him to file a return. He is not subject to any "coercion" to confess to crime he has not committed. There is no tax, and there is no penalty for not engaging in wagering or for not filing the return if one is not subject to the tax. It therefore cannot be said that the use of Forms 730 [45] or other evidence of excise tax payment contributes to the unreliability of the fact finding process in a trial for income tax evasion, or even for wagering.

There is also the other, now paramount, policy consideration behind the privilege against self-incrimination —the liberty of citizens and the purity of the Courts. This was obviously the motivating factor behind the decisions in *Marchetti* and *Grosso* because—as has been shown—the coerced confessions in this instance are highly reliable. In *Marchetti* and *Grosso* the Supreme Court was given a singular opportunity to strike directly at the coercion rather than its fruits. In contrast to other decisions, such as *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. ed. 2d 694 (1966); and *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L. ed. 2d 977 (1964) where the Court sought to halt coercion by destroying its value to the interrogator, it had, in the wagering tax system, an opportunity to end the coercion directly. Out of deference to the Congressional purpose, and over the objection of the Chief Justice, the Court found that it was better to bar the criminal penalties for refusing to supply the information rather than limit its use. *Marchetti* v. *United States*, 19 L. ed. 2d 889, 903-05 (1968); *Grosso* v. *United States*, 19 L. ed. 2d 906, 913 (1968). It would be inappropriate for this Court to adopt a rule expressly rejected by the Supreme Court.

This is especially true under these circumstances. While the Supreme Court did not lay down an exclusionary rule, this Court is asked to retroactively transform and apply the principles of *Marchetti* and *Grosso* to a case which had reached a final decision prior to their enunciation.

The Supreme Court itself has been reluctant to give retroactive application to the newer Fifth Amendment rules. In [46] *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. ed. 2d 992 (1966) it denied retroactive application to the rules concerning right to counsel and warnings of self-incrimination at criminal interrogations. The Court said, at 384 U.S. 719, 728-29; 16 L. ed. 2d 882, 889:

> Finally, we emphasize the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to *Jackson* v. *Denno*, supra, (378 U.S. 368, 12 L. ed. 2d 908 (1964)) because confessions are likely to be highly persuasive with a jury and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retroactive application to *Griffin* v. *California*, supra, (380 U.S. 609, 14 L. ed. 2d 106 (1965)) despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial.

Jackson v. *Denno*, 378 U.S. 609, 12 L. ed. 2d 908 (1964) struck down the New York system of allowing juries to determine the voluntariness of confessions. The rule was made retroactive, despite a previous decision to

the contrary, because of the great danger that jurors may have considered or been influenced by coerced and unreliable confessions even after they determined them to be involuntary. *Tehan* v. *Shoot*, 382 U.S. 406, 15 L. ed. 2d 453 (1966) held that *Griffin* v. *California*, 380 U.S. 609, 14 L. ed. 2d 106 (1965) prohibiting comment on an accused's failure to testify should not be made retroactive because of the states' justified reliance upon previous decisions of the Court and the devastating effect upon thousands of final convictions.

The rule of *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. ed. 2d 779 (1963) requiring the states to supply counsel to indigent [47] defendants in all felony prosecutions was given retroactive application because the absence of counsel tainted the entire criminal proceeding. On the other hand, the rule of *United States* v. *Wade*, 388 U.S. 218, 18 L. ed. 2d 1149 (1967) and *Gilbert* v. *California*, 388 U.S. 263, 18 L. ed. 2d 1178 (1967) requiring the presence of counsel at pre-trial lineup and identification procedures, was denied retroactive effect in the decision of *Stovall* v. *Denno*, 388 U.S. 293, 18 L. ed. 2d 1199 (1967), because of the drastic effects of retroactivity on numerous final convictions.

In each of the cases cited, the constitutional infirmity had at least some effect on the integrity and validity of the fact finding process. It became a question of weighing that effect against other considerations such as the reliance placed on previous decisions and the danger of clogging lower courts with numerous old and stale cases. In *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. ed. 2d 601 (1965), the Court refused to apply *Mapp* v. *Ohio*, 367 U.S. 643, 6 L. ed. 2d 108 (1961) which prohibited the introduction of illegally seized evidence in state court

proceedings to cases which had become final prior to its decision. It is the archtype of the use of an exclusionary rule to prohibit unconstitutional conduct on the part of law enforcement officers where that conduct did not intrinsically affect the validity of the trial. The fact that physical evidence was illegally seized has no effect on its probative value, but is excluded to prevent police from resorting to illegal seizures.

An examination of these and other cases reveals no instance where the Court has given retroactive application to an exclusionary rule or other Constitutional guarantee where the reliability of the fact finding process had not been jeopardized. [48] The briefs for plaintiff have suggested none. In plaintiff Mackey's trial, the introduction of the wagering tax forms did not jeopardize the integrity of the trial except to the extent that they showed that he was engaged in illegal activities other than that charged. This possibility was raised by Mackey's attorneys at the trial, and apparently on appeal, and both times the Courts held that there was no error.

Finally, there is the possibility that plaintiff waived his rights, if any, to have the items excluded on the ground that their admission violated his rights against compulsory self-incrimination. Neither plaintiff nor his attorneys raised the privilege against self-incrimination at the time of trial. It is not claimed that plaintiff filed the forms or paid the tax under protest. In short, at no time was the question of possible self-incrimination raised with respect to these forms. On the other hand, it is admitted that plaintiff or his counsel did not know of the decisions in *Marchetti* and *Grosso* at the time of trial. The only law on the topic was found in the decisions of *United States* v. *Kahriger*, 345 U.S. 22, 97 L. ed. 754

(1953) and *Lewis* v. *United States,* 348 U.S. 419, 99 L. ed. 475 (1955) which heid that the wagering occupation tax (Title 26 U.S.C. §4411 as opposed to Title 26 U.S.C. §4401, the excise tax involved here) was constitutional and did not violate the privilege against self-incrimination. These decisions were overturned by the decision in *Marchetti* which held that a plea of self-incrimination was at least a bar to prosecution. They are not without some effect, however, because in *Grosso* the Court reversed the defendant's conviction for violating Section 4411 even though he had never raised the constitutional question. The Court [49] stated, at 19 L. ed. 2d 906, 913-14, that the defendant's reliance on the *Kahriger* and *Lewis* decisions precluded considering his silence as a voluntary waiver of his rights. See also *Harris* v. *United States,* 390 U.S. F. 2d 617 (8th Cir. 1968). Plaintiff here argues that he, likewise, cannot be considered to have waived rights which he did not know existed. The situation is not the same, however, because *Kahriger* and *Lewis* did not consider the possibility of self-incrimination involved in the excise tax, but only with respect to the occupation tax. One factor considered in both decisions with respect to the occupation tax was its prospective application. That is, the Court suggested that a person did not incriminate himself of having committed a crime by paying the occupation tax, because he was supposed to pay it before he gambled and not afterwards. See *United States* v. *Kahriger,* 345 U.S. 22, 32-33, 97 L. ed. 754, 763 (1953). The excise tax was different because there no tax was due until the wagers were taken and the crime committed. Paying the wagering tax in most places amounts to the admission of a crime, but no decision has been suggested where this was directly challenged. Therefore, if a defendant had wished to raise the

constitutional question, he would not have been justified in relying on non-existent decisions, but should have raised it at the first instance, either by not paying the tax and raising the issue when prosecuted, or by paying the tax and objecting to the use of the information thus gained. The plaintiff here did neither. He paid the tax and did not, through his attorneys or otherwise, raise the constitutional question at trial. It is therefore held that he waived any right to have the information excluded on the basis of his privilege against self-incrimination.

In conclusion, it is held that the briefs, records and [50] files before the Court conclusively show that plaintiff is entitled to no relief on the ground that his right against self-incrimination was violated because, (1) the Supreme Court's reasons for holding that excise tax form were incriminating are unrelated to their possible use in a trial for income tax evasion; (2) the Supreme Court itself refused to adopt a rule prohibiting their use at trial; (3) the information is not the product of an unconstitutional statute; (4) the principles plaintiff seeks to draw from the recent decisions should not be applied retroactively in this instance, because the admission of the exhibits in question did not impair the integrity of the fact finding process; and (5) the plaintiff waived any right to have the exhibits excluded on the grounds of self-incrimination by not raising it at trial. The plaintiff's petition for relief under Title 28 U.S.C. §2255 is denied.

/s/ George N. Beamer
U. S. District Judge

Enter: September 6, 1968

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed September 13, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[51] NOTICE OF APPEAL.

Notice is Hereby Given that plaintiff Fred T. Mackey, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order dated August 13, 1968, denying his motion for collateral relief under Title 28 U.S.C. 2255.

/s/ Robert J. Downing
/s/ William M. Ward
Attorneys for Appellant
Fred T. Mackey
39 South La Salle Street
Chicago, Illinois 60603
ANdover 3-2180

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
(Filed October 16, 1968)

FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.
No. 17200

[55] STIPULATION TO MAKE COPIES OF EXHIBITS PART OF THE RECORD ON APPEAL.

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the attached fifteen (15) copies of Form 730, Wagering Tax Returns are true and correct copies of fifteen (15) of the sixty (60) Wagering Tax Returns admitted into evidence as Plaintiff's Exhibits 30 through 89 inclusive in the criminal cause entitled *United States* v. *Mackey*, Criminal No. 3411, in the United States District Court for the Northern District of Indiana, Hammond Division. It is further stipulated by and between the parties through their respective counsel that said copies of said exhibits may be made a part of the Record on Appeal in this cause.

/s/ Fred T. Mackey,
Plaintiff-Appellant
By /s/ Robert J. Downing
/s/ William M. Ward
His Attorneys
United States of America,
Defendant-Appellee
By /s/ Alfred R. Uzis

3

Form 730 — Department of the Treasury — Internal Revenue Service

TAX ON WAGERING 3 35046

(Section 3285 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 2-23,1956

(Title) Operator
(Owner, president, partner, member, etc.)

35 1372-P

FRED HACKET
2129 WASHINGTON
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 11,740.10
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1174.01
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1174.01

MONTH
JANUARY 1956
INDIANAPOLIS

85

Penalty	$
Interest	$
Total due	$ 1174.01

RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully.

3

Form 730 — Department of the Treasury — Internal Revenue Service

TAX ON WAGERING 4 35006

(Section 3285 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 3-26-56

OPERATOR
(Owner, president, partner, member, etc.)

35 1372-P

FRED HACKET
2129 WASHINGTON
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 11212.30
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1121.23
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1121.23

MONTH
FEBRUARY 1956
INDIANAPOLIS

85

Penalty	$
Interest	$
Total due	$ 1121.23

RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully.

5

Form 730 — Department of the Treasury — Internal Revenue Service

TAX ON WAGERING 5 35120

(Section 3285 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 4-19-56

OPERATOR
(Owner, president, partner, member, etc.)

35 1372-P

FRED HACKET
2129 WASHINGTON
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,374.60
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1237.48
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1237.48

MONTH
MARCH 1956
INDIANAPOLIS

83

Penalty	$
Interest	$
Total due	$ 1237.48

RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully.

56

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 5-15-57

(Title) Operator
(Owner, president, partner, member, etc.)

Due to circumstances of which I have no control, this is all for April 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(USE SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 8525.20
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 852.52
5. Less credits (No credit allowed unless supported by evidence. See instructions 4 (a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 852.52

MONTH
APRIL 1957
INDIANAPOLIS
98

Penalty... $
Interest... $
Total due. $ 852.52

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions on back.

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 6-5-57

(Title) Operator
(Owner, president, partner, member, etc.)

There was no action during this period.

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(USE SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	00000
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$
5. Less credits (No credit allowed unless supported by evidence. See instructions 4 (a) and (b))	$
6. Net tax due (item 4 less item 5)	$

MONTH
MAY 1957
INDIANAPOLIS
92

Penalty... $
Interest... $
Total due. $ 00000

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions on back.

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 7-15-57

(Title) operator
(Owner, president, partner, member, etc.)

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(USE SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 0
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$
5. Less credits (No credit allowed unless supported by evidence. See instructions 4 (a) and (b))	$
6. Net tax due (item 4 less item 5)	$

JUNE 1957
INDIANAPOLIS
101

Penalty... $
Interest... $
Total due. $

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions on back.

730 (Rev. Feb. 1954)
Treasury Department
Internal Revenue Service

TAX ON WAGERING / 3 35251

(Section 4401 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including accompanying certificates and statements) has been examined and to the best of my knowledge and belief is a true, correct, complete return.

(Signed) Fred Mackey (Date) 8-14-58

Operator
(Owner, president, partner, member, etc.)

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$12,354.15
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$1,235.42
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

MONTH: JULY 1958 INDIANAPOLIS 81

Penalty $
Interest $
Total due $1,235.42

NAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16-44001-8

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING 9 35317

(Section 4401 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 9-15-58

Operator
(Owner, president, partner, member, etc.)

-1372-P

Fred Mackey 35-1372-P
2129 Washington St.
Gary Ind

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$12,264.05
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$1,226.41
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

MONTH: Aug 1958 92

Penalty $
Interest $
Total due $1,226.41

IGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16-44001-8

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING 10 35324

(Section 4401 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 10-15-58

Operator
(Owner, president, partner, member, etc.)

Fred. Mackey 35-1372-P
2129 Washington St.
Gary, Ind

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$11,980.43
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$1,198.04
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

FILED WITH REMITTANCE
OCT 16 1958
INDIANAPOLIS

MONTH: September 93

Penalty $
Interest $
Total due $1,198.04

FORM 730 (Rev. Feb. 1955)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

3 357151

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 1-15-60

(Title) Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,302.20
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3) REV.	$ 1,230.22
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1,230.22

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
DECEMBER, 1959
INDIANAPOLIS
98

Penalty	$
Interest	$
Total due.	$ 1,230.22

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully.

FORM 730 (Rev. Feb. 1955)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

12 357419

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 12-15-59

(Title) OPERATOR
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 6,433.40
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2 DEC 17 1959	$
4. Tax (10 percent of item 3) INT. REV.	$ 643.34
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 643.34

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
NOVEMBER 1959
INDIANAPOLIS
93

Penalty	$
Interest	$
Total due.	$ 643.34

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully.

FORM 730 (Rev. Feb. 1955)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 11-14-59

(Title) Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

NO LIBILITY FOR THIS PERIOD

RECEIV
NOV

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
OCTOBER 1959
INDIANAPOLIS
92

Penalty	$
Interest	$
Total due.	$

IMPORTANT.—Follow instructions carefully.

(OMIT)

730 (Rev. Feb. 1956)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

3 357219

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 2-15-60

Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,402.65
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1,240.30
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1240.30

35 1372-P

FRED HACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
JANUARY 1960
INDIANAPOLIS

114

Penalty	$
Interest	$
Total due.	$ 1,240.30

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16—64071-6

730 (Rev. Feb. 1956)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

3 357622

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 2-15-60

Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,427.91
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1,242.80
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1242.80

35 1372-P

FRED HACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
FEBRUARY - 1960
INDIANAPOLIS

119

Penalty	$
Interest	$
Total due.	$ 1,242.80

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16—64071-6

730 (Rev. Feb. 1956)
Treasury Department
Internal Revenue Service

TAX ON WAGERING

5 357002

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 4-15-60

Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 13,400.5
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1,340.05
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

35 1372-P

FRED HACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
MARCH - 1960
INDIANAPOLIS

127

Penalty	$
Interest	$
Total due.	$ 1,340.05

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16—64071-6

JUDGMENT

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Wednesday, June 4, 1969

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Otto Kerner, *Circuit Judge*
Hon. Julius J. Hoffman, *District Judge*

No. 17200
Fred T. Mackey,
Plaintiff-Appellant,
vs.
United States of America,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 JANUARY SESSION, 1969

No. 17200
FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 4, 1969

Before CUMMINGS and KERNER, *Circuit Judges* and HOFFMAN, *District Judge.*[1]

HOFFMAN, *District Judge.*

The question presented for decision is whether a conviction for income tax evasion should be set aside on collateral attack because the trial court admitted into evidence the defendant's federal gambling tax returns which, the Supreme Court has subsequently held, the defendant could not have been required to file over a timely claim of the privilege against self-incrimination. We conclude that the question must be answered in the negative, and affirm.

Defendant was convicted on March 24, 1964, of five charges of income tax evasion committed by means of false and fraudulent returns for the calendar years 1956 through 1960, in violation of Section 7201, Internal Revenue Code of 1954, 26 U.S.C. Sec. 7201. He was sentenced

[1] Judge Hoffman is sitting by designation from the United States District Court for the Northern District of Illinois.

to concurrent terms of five years imprisonment, and a fine of $10,000, on each count. Upon a prior appeal, this Court affirmed the conviction, 345 F. 2d 499 (1965), and the United States Supreme Court denied certiorari, 382 U.S. 824.

The prosecution proceeded upon a net worth theory, predicated upon a showing that defendant's total assets had increased during the period in question by an amount which could not be accounted for by his reported income. In such a prosecution, "[p]roof of a likely source, from which the jury could reasonably find that the net worth increase sprang," is an essential element of the case. *Holland* v. *United States*, 348 U.S. 121, 138 (1954). As stated upon the prior appeal, "Government's theory was that the source of defendant's excessive net worth increases was a policy wheel operation which defendant admitted conducting and that the excess of $4000 per week . . . was from profits earned by defendant on this operation." 345 F. 2d, at 501. This theory was borne out by the proof. "Defendant concedes that he was a policy wheel operator during the years in question. There was no direct evidence that any of defendant's alleged unreported income was obtained from his policy wheel operation. Direct evidence is not required." 345 F. 2d, at 506-507.

One type of proof establishing this likely source of unreported income was a series of sixty monthly federal gambling excise tax returns filed by defendant during the years in question. These returns, on Form 730, were required to accompany the payment of the ten per cent excise tax on wagering receipts imposed by Section 4401 of the Internal Revenue Code, 26 U.S.C. Sec. 4401; Treas. Reg. Sec. 44.4011(a)-1(a). At the trial, defendant objected to the introduction of these returns on the ground that they were cumulative, since their contents were disclosed by Schedule C to the income tax returns already in evidence, and were prejudicial and inflammatory. The District Court overruled this objection, and this Court affirmed, without specific discussion, finding "no prejudicial error." 345 F. 2d, at 507. In neither court did the defendant claim that the returns infringed his constitutional privilege against self-incrimination. With the de-

nial of certiorari, the judgment became final and defendant began serving his sentence in December, 1965.

On January 29, 1968, the United States Supreme Court handed down its decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, holding that the federal wagering tax laws violated the privilege against self-incrimination, and that a claim of that privilege bars a prosecution for failure to register, report, or pay the taxes imposed by those laws. Immediately thereafter, defendant filed his motion under Section 2255 of the Judicial Code, 28 U.S.C. Sec. 2255, to set aside the judgment of conviction on the authority of these decisions. Defendant has appealed to this Court from the District Court's denial of this motion.

I.

At the threshold, we are met by the Government's argument that proceedings under Section 2255 are not a substitute for a direct appeal, and are not ordinarily available to set aside a final conviction on the ground that evidence was erroneously introduced and admitted. That argument, supported by a number of decisions in other Circuits, has been put to rest by the Supreme Court's decision in *Kaufman* v. *United States*, 394 U.S. ....., 889 S. Ct. 1068 (March 24, 1969). Sustaining a motion under Section 2255 based on the admission of evidence produced by unlawful search and seizure in violation of the Fourth Amendment, the Court concluded broadly that, in enacting the Section, "Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack." 394 U.S., ..., 89 S. Ct., at 1075. Since defendant's claim is premised on the Constitution, his remedy is not foreclosed.

Defendant's motion under Section 2255 rests wholly upon his claim that the reception into evidence of the Form 730 wagering excise tax returns infringed his privilege against self-incrimination conferred by the Fifth Amendment. He did not, however, decline to file the returns, nor did he, when filing them, raise any protest upon that ground. No claim of the privilege was made at the trial, to support his objection to the admissibility

of the exhibits, and no question of self-incrimination was presented to this Court in the course of the prior appeal. These failures to invoke the privilege do not work a waiver, in defendant's view, since his silence resulted from reliance upon the Supreme Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955), holding that the wagering taxes did not violate the privilege against self-incrimination. Until these decisions were overruled, after his conviction had become final, by the subsequent decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), the defendant reasons, he had no support for a claim of privilege, and his failure to make the claim must be excused.

As the District Court demonstrates in its closely reasoned opinion, a careful reading of the authorities casts doubt on this attempted justification. The prior decisions in *Kahriger* and *Lewis* involved a different tax from the tax here involved: they held only that the wagering *occupation* tax (26 U.S.C. Sec. 4411), as distinguished from the *excise* tax here in issue (26 U.S.C. Sec. 4401), did not violate the privilege against self-incrimination, in part upon the rationale that the occupation tax, to be paid annually in advance, did not involve any possible incrimination for *past* crimes. See *United States* v. *Kahriger*, 345 U.S. 22, 32-33 (1953). The excise tax, imposed upon wagering receipts after the fact, would not necessarily survive under this rationale, and the defendant in *Grosso* v. *United States*, 390 U.S. 62 (1968), recognized this distinction by raising a plea of self-incrimination to the charge of failure to pay the *excise* tax here involved, but not to the charge of failure to pay the occupation tax considered in *Kahriger* and *Lewis*, where the plea would have been futile. Moreover, as the District Court points out, all four of the Supreme Court decisions involved a failure to file the required returns; none directly adjudicated the admissibility of returns already filed by the defendant without objection.

II.

There is, however, a more fundamental flaw in defendant's motion. To avoid the consequence of waiver from

his failure to claim the privilege, he asserts that the *Marchetti* and *Grosso* decisions worked a marked change in the law. That assertion inevitably presents the question whether those decisions should be applied retroactively, as the standard for review of judgments already final when the new principles were declared, or whether the commands should be confined to prospective application. In a line of cases tracing back to *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Supreme Court has made it plain that decisions establishing new principles of constitutionality in criminal litigation do not necessarily or automatically apply to cases already closed. The Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application." 38 U.S., at 628.

Whether the principles of *Marchetti* and *Grosso* are to be retroactively applied has yet to be answered directly by the Supreme Court. The criteria which control the question are nonetheless clearly delineated. The retroactivity or nonretroactivity of the decisions is a function of three considerations: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Desist* v. *United States,* 394 U.S. ....., 89 S. Ct. 1030, 1033 (March 24, 1969); *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967); *Johnson* v. *New Jersey,* 384 U.S. 719, 727 (1966).

Foremost among these factors is the purpose to be served by the new constitutional rule. Falling on one side of the line are standards laid down under the Sixth Amendment, intended to protect the integrity of the fact-finding process and the fairness of the trial itself, which have been applied retroactively under this test. Thus denial of the right to counsel in any stage of the judicial proceedings taints the validity of any action taken, and warrants relief against the consequences. See, for example, *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968) (denial of counsel at preliminary hearing); *McConnell* v. *Rhay,* 393 U.S. 2 (1968) (denial of counsel at hearing on revocation of probation). The right to confront adverse witnesses, similarly guaranteed by the Sixth Amend-

ment, is attended to assure the reliability of findings of fact by subjecting the testimony to cross examination, a purpose which calls for retrospective relief. See *Roberts* v. *Russell*, 393 U.S. 393 (1967) (confession of co-defendant); *Berger* v. *California*, 393 U.S. 314 (1969) (prior testimony of absent witness); *Bates* v. *Nelson*, 393 U.S. 16 (1968). On the other side of the line, the Fourth Amendment's prohibition against unreasonable searches and seizures, and federal anti-wiretapping laws, are intended to preserve privacy, and the resulting exclusionary rules of evidence are adopted not to exclude unreliable evidence but to deter illegal police action. Retroactive application of such exclusionary rules is not justified when the "misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved." *Desist* v. *United States*, 394 U.S. ....., 89 S. Ct. 1030, 1034 (March 24, 1969); *Fuller* v. *Alaska*, 393 U.S. 80 (1968); *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

Within the scope of the Fifth Amendment, the purpose of the Due Process clause to assure fundamental fairness has been held to require retroactivity for rules concerning the presentation of coerced confessions to the jury, *Jackson* v. *Denno*, 378 U.S. 368 (1964), or concerning line-up procedures which are inherently conducive to mistaken identification. *Foster* v. *California*, 394 U.S. ....., 89 S. Ct. 1127, 1128 (March 24, 1969). On the other hand, cases arising under the Fifth Amendment's privilege against self-incrimination involve the congeries of purposes, including the privacy of the individual and the adversary system of adjudication, which that privilege embodies. The "Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. * * * As we pointed out in Linkletter with respect to the Fourth Amendment rights there in question, 'the ruptured privacy . . . cannot be restored.'" *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966). On the basis of these limits of purpose, the Court held that its reinterpretation of the

scope of the privilege against self-incrimination did not warrant retroactive application. The holding is re-confirmed in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

Defendant contends, however, that the wagering tax returns constitute coerced confessions, since they were filed under the compulsion of a legal command, and that retroactivity follows automatically once the question is so characterized. But the compulsion which turns interrogation into a violation of the privilege against self-incrimination is not the same as the coercion and intimidation which make a confession involuntary and a denial of Due Process. See, for example, *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Boulden* v. *Holman*, 394 U.S. ....., 89 S. Ct. 1138, 1139-40 (March 24, 1969). Here there is no suggestion that the defendant's will was overborne, by physical intimidation or coercion, to lead him to a false admission that he was engaged in gambling. The interrogation to which he responded, by filing the wagering tax returns, was addressed to the public at large. Certainly he was subject to a lesser degree of compulsion than a lone defendant singled out by accusation and deprived of personal liberty and support while he is subjected to in custody interrogation by the police. Although such circumstances combine to make the defendant's "statements the product of compulsion" in violation of the policy of the privilege against self-incrimination, as declared in *Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966), the Supreme Court has held that the new rule excluding confessions so compelled is not to be given retroactive effect. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). The unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws. Cf. *Stovall* v. *Denno*, 388 U.S. 293 (1967) (non-retroactivity of requirement of counsel during line-up procedures); *DiStefano* v. *Woods*, 392 U.S. 631 (1968) (non-retroactivity of jury trial for serious criminal contempts).

In deciding that the purpose of the rules announced in *Marchetti* and *Grosso* (390 U.S. 39 and 62), does not call for retroactivity in the case before us, we do not mean to intimate how the different question of retroactivity

would be decided in other situations. Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of Kahriger and Lewis themselves (345 U.S. 22; 348 U.S. 419), who have claimed the privilege and have been convicted of failure to file the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned. See *Graham* v. *United States,* ..... F. 2d ..... (6th Cir., March 10, 1969), denying retroactivity in that situation. Here the defendant was charged not with failure to file the returns, nor even of a crime of gambling, but of evasion of income taxes. The purpose of the rule of *Marchetti* and *Grosso* has no application to warrant retroactively here. Its object was to protect the individual against self-incrimination under the "comprehensive system of federal and state prohibitions against wagering activities . . ." *Marchetti* v. *United States,* 390 U.S. 39, 48 (1968). If gambling were not a crime, or if defendant had been granted immunity from all gambling prosecutions, he could have claimed no privilege by reason of potential income tax jeopardy against filing the required wagering excise tax returns, any more than against the filing of the income tax return itself. See *United States* v. *Sullivan,* 274 U.S. 259 (1927). In this prosecution, the returns were no more incriminating than a report of any lawful business activity as a likely source of unreported income. Under the circumstances, the purpose of *Marchetti* and *Grosso* is extraneous to the conviction, and does not call for retrospective application.

The factors of reliance and administrative difficulty which control, along with purpose, the prospective or retroactive effect of the new rule lead to the same conclusion of nonretroactivity. An avowed purpose of Congress in enacting the wagering tax system was to provide information to interested prosecuting authorities. *Marchetti* v. *United States,* 390 U.S. 39, 58-59 (1968). This object was aided by the Supreme Court's earlier decisions in *Kahriger* and *Lewis,* sustaining the constitutionality of the scheme. Law enforcement officers were thus expressly invited to make use of the information disclosed, and to abandon their pursuit of evidence through

other channels in reliance upon congressional and judicial approval of this offered source. Retroactivity was denied in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), when the law enforcement officials were guilty of a plain violation of federal laws against wiretapping, and had relied only upon a judicial failure to enforce the laws by excluding the resulting evidence in state courts. Here the evidence was gathered with the blessings of federal law. Reliance was accordingly justified and extensive. "Evidence of the possession of a federal wagering tax stamp or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained." *Marchetti* v. *United States,* 390 U.S. 39, 47-48 (1968).

As a result of such reliance, the burdens which would be imposed upon the administration of justice by retroactive application of the ruling would be formidable. The third factor among the criteria of prospective effect is thus also satisfied. With a rule of retroactivity, every gambling conviction could be re-opened upon a claim that disclosures under the federal laws had contributed to the conviction. The rule would require the courts to re-examine the total evidence in each case, and "would necessarily oblige the state [or federal] prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes . . ." *Marchetti* v. *United States,* 390 U.S. 39, 59, (1968). See also *Desist* v. *United States,* 394 U.S. ....., 80 S. Ct. 1030, 1033 (March 24, 1969).

It follows that the District Court correctly denied defendant's motion to set aside the conviction under Section 2255.

Judgment Affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

Supreme Court of the United States

No. 529 ---- , *October Term, 19* 69

Fred T. Mackey,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed December 8 ------ , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 8.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.